

See Dissenting Opinion

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

MARCO CRUZ,

Defendant and Appellant.

E074690

(Super.Ct.No. RIF100875)

OPINION

APPEAL from the Superior Court of Riverside County. John D. Molloy, Judge.
Affirmed.

Susan K. Shaler, under appointment by the Court of Appeal, for Defendant and
Appellant.

No appearance for Plaintiff and Respondent.

Defendant and appellant, Marco Cruz, filed a petition for resentencing pursuant to Penal Code section 1170.95,¹ which the court dismissed. After defense counsel filed a notice of appeal, this court appointed counsel to represent him. Counsel has filed a brief under the authority of *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738, setting forth a statement of the facts, a statement of the case, and two potentially arguable issues: (1) whether the court erred in conducting the hearing on defendant's petition outside of his presence and without taking a waiver of his "right" to be present at the hearing, and (2) whether the court erred in dismissing defendant's petition without issuing an order to show cause. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

On August 22, 2000, the victim was standing next to his pickup truck talking with two women when a black car, identified by one witness as a Toyota Corolla, drove by. The car drove by a second time; the victim began to run when the car turned around and approached the group for a third time. The shooter got out of the passenger side of the car, aimed a gun over the roof of the car, and fired three to five shots. The shooter got back into the car, which drove away. The victim was shot and killed.

One of the women with whom the victim had been talking selected defendant out of a photographic lineup as the person who looked closest to the shooter. At trial, the woman testified that defendant was not the shooter. Another woman identified the driver and owner of the vehicle from which the shots had been fired. The driver's girlfriend

¹ All further statutory references are to the Penal Code unless otherwise indicated.

identified defendant from a photographic lineup as a person who had been with the driver on the day of the shooting. She directed an investigator to the home where she had dropped defendant off on the day of the shooting. A man who had been housed in jail with defendant testified that defendant had told him he shot the victim to regain respect with his gang.

On December 6, 2002, a jury found defendant guilty of second degree murder and further found true a special allegation that in the commission of that crime, defendant personally discharged a firearm causing great bodily. Thereafter, the trial court found true an allegation that defendant had suffered a prior strike conviction. The court sentenced defendant to an indeterminate term of imprisonment of 55 years to life.

On February 28, 2019, defendant filed a petition for resentencing pursuant to section 1170.95, contending he was not the actual killer. The People filed a response and opposition maintaining, in pertinent part, that defendant was not entitled to the relief requested because he was the actual killer. Counsel for defendant filed a reply in support of the petition noting the jury had found true an allegation defendant had personally discharged a firearm causing death. At a hearing on the petition, the People observed that the jury found defendant to be the actual shooter. The court dismissed the petition.

II. DISCUSSION

We offered defendant an opportunity to file a personal supplemental brief, which he has not done. Pursuant to the mandate of *People v. Kelly* (2006) 40 Cal.4th 106, we have independently reviewed the record for potential error and find no arguable issues.

III. DISPOSITION

The order denying defendant's petition for resentencing pursuant to Penal Code section 1170.95 is affirmed.

McKINSTER
J.

I concur:

RAMIREZ
P. J.

[*P. v. Cruz*, E074690]

MENETREZ, J., Dissenting.

The appellate review procedures under *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*) and *Anders v. California* (1967) 386 U.S. 738 (*Anders*), in which we review the record ourselves to determine whether there are any arguable issues, apply “only to a defendant’s first appeal as of right.” (*People v. Thurman* (2007) 157 Cal.App.4th 36, 45; *People v. Serrano* (2012) 211 Cal.App.4th 496, 498 (*Serrano*).) *Wende/Anders* review is highly unusual and rooted in the constitutional right to counsel, and courts have repeatedly declined to apply it in other contexts. (*Pennsylvania v. Finley* (1987) 481 U.S. 551, 554-555; *Conservatorship of Ben C.* (2007) 40 Cal.4th 529, 535; *In re Sade C.* (1996) 13 Cal.4th 952, 959; *People v. Kisling* (2015) 239 Cal.App.4th 288, 290; *People v. Dobson* (2008) 161 Cal.App.4th 1422, 1425; *People v. Taylor* (2008) 160 Cal.App.4th 304, 307-308; *Glen C. v. Superior Court* (2000) 78 Cal.App.4th 570; 579.) Because this appeal concerns a postjudgment proceeding in which there is no constitutional right to counsel, appellant has no right to *Wende/Anders* review. Because appellant’s counsel filed an opening brief raising no issues, and appellant was notified but did not file a supplemental brief, we should not affirm but rather should dismiss the appeal as abandoned. (*Serrano*, 211 Cal.App.4th at pp. 503-504.) I therefore respectfully dissent.

MENETREZ

J.